Supreme Court, U.S.
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No.

In the Supreme Court
OF THE
United States

SPRING TERM, 1997

CHARLES F. CONNELL and JULIA K. CONNELL, husband and wife, and JULIA K. CONNELL, individually as successor-in-interest; VIRGINIA DULLANTY, PATRICIA SCHULLER, each as their separate property,
Petitioners,
vs.
HARLAN D. DOUGLASS and MAXINE H. DOUGLASS, husband and wife,
Respondent,
vs.
UNITED STATES POSTAL SERVICE,
Respondent.

On Petition For A Writ of Certiorari To The Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court below erred by ordering the reinstatement of a lease which had expired by operation of Washington State Law?

2. Whether the court below erred when it failed to exercise its authority to certify this Washington State legal question of first impression to the Washington State Supreme Court for final determination pursuant to Washington State Rules on Appeal RAP 16.1 and 16.16?

3. Whether the court below erred in holding that the Trial Court, in granting a tenant "equitable reinstatement" of an expired lease, could not also do equity to the landlord by adjusting the rent to fair market value?

PARTIES TO THE PROCEEDINGS and RULE 29.1 STATEMENT

The Appellants/Cross Appellees in the Ninth Circuit, who are the Petitioners here, are JULIA K. CONNELL, VIRGINIA DULLANTY and PATRICIA SCHULLER. The Appellees/Cross Appellants in the Ninth Circuit, who are the Respondents here, are HARLAN D. DOUGLASS and MAXINE H. DOUGLASS, husband and wife.

Also, Appellees and Cross Appellees in the Ninth Circuit and Respondent here is the United States Postal Service.

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JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was entered on August 14, 1996. A timely petition for rehearing with a suggestion for rehearing en banc was denied on November 29, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

On October 6, 1970, CHARLES F. CONNELL and JULIA K. CONNELL, husband and wife, Petitioners ("CONNELL") entered into an assignable ground lease, leased to the United States Post Office (hereafter POSTAL SERVICE), property in Spokane County Washington. On May 24, 1971, the POSTAL SERVICE assigned the ground lease to HARLAN D. DOUGLASS and MAXINE H. DOUGLASS, Respondents, ("DOUGLASS"). Subsequently, DOUGLASS and the POSTAL SERVICE entered into a building lease (lease back) for a building built upon the above-referenced property under a lease dated January 22, 1973.

The initial term of the building lease was for 15 years with five options of five years each. The first renewal period for the assignable ground lease began January 1, 1988 for the period ending December 31, 1992, and was properly exercised. Notice of exercise of the second renewal period was due by November 1, 1992. The court found no evidence of delivery, or even mailing of said letter, as required by the lease. The trial court held that DOUGLASS had failed to renew the assignable ground lease and that the assignable ground lease had therefore expired on December 31, 1992. This resulted in the bargained for vesting of title of the premises all building structures and improvements in the owner, CONNELL, per the language of the assignable ground lease. In May 1993, CONNELL notified DOUGLASS the lease had expired. At this point, DOUGLASS attempted to renew the lease by sending a fax notice of intent to renew to the CONNELL's attorney when, in fact, the express language of the contract provided that any renewal of the lease "... shall be exercised by causing to be delivered to the owner by certified or registered mail written notice of renewal and said notice shall be mailed to the

owner at least 60 days prior to commencement of such renewal period."

The district court reinstated the lease under equitable principles as requested by DOUGLASS. The district court however, conditioned reinstatement upon increasing the rent from $6,000 per year to $20,000 per year. The district court found that fair market value for the rental of the land was $24,000 per year.

The district court acquired jurisdiction when the Postal Service was joined as a party and had the case removed from state court under _____.

The appellate court upheld the reinstatement of the lease but reversed the trial court decision to increase the ground rent.

REASONS FOR GRANTING THE WRIT

A. This case of first impression should be certified to the Washington State Supreme Court for decision.

This is a case of first impression in the State of Washington and in the entire United States. A tenant ignored the requirement that the tenant must give a written notice of renewal and, as the District Court found on the uncontroverted facts, the ground

lease at issue in this cause had expired on December 31, 1992.

No case in the United States has held that a Court, State or Federal, has "inherent power" to reactivate this legally expired lease. There is no case in the State of Washington which holds that an expired lease can be revived.

This Court should take jurisdiction of this cause and order the Courts below to certify this cause to the Supreme Court of Washington for an authoritative determination of Washington State Law.

In its supervisory role over the Federal judiciary, this Court should adopt a rule which requires the Federal Courts to sua sponte certify all questions of first impression of State Law to the appropriate State Supreme Court when that procedural device is available within the State.

The compelling reason for hearing argument on this issue is to relieve the burden upon the Federal Courts when unresolved issues of State Law arise which are outcome determinative; and to afford litigants their due process rights under the Fifth Amendment.

Aptly illustrating the unfair burden upon the litigants is the situation which arose when the District Court for the Western District of Washington decided Travelers Ins. Co. v. Ross Elec. of Wash., Inc., 685 F.Supp. 742 (W.D.Wash.1988) and granted summary judgment against an insured on the grounds that "Response Costs" incurred by an insured under CERCLA are "equitable in nature" and, therefore, not "damages" within meaning of comprehensive general liability policy coverage clauses.

When this precise issue was brought to the Supreme Court of Washington in Boeing Co. v. Aetna Cas. & Sur. Co., 113 Wash.2d 869, 886-7, 784 P.2d 507 (1990), the Supreme Court of Washington held that the Travelers Insurance Co. case cited above was not a correct statement of Washington Law because, in Washington, CERCLA response costs are "damages" which insurance carriers are obligated to pay.

The unnecessary burden upon Federal Courts and the lack of finality in a land title case of this type is illustrated by Pierce v. Cook & Co., Inc., C.A.10th, 1975, 518 F.2d 720, 423 U.S. 1079; *certiorari denied* 96 S.Ct. 866; 47 L.Ed.2d 89 noted 1976, 29

Rut.L.Rev. 921; 62 Va.L.Rev. 414. In Pierce, three individuals riding in the same automobile at the time of an accident brought three separate state court suits against Cook & Co., Inc., alleging negligence by an independent contractor of Cook & Co., Inc. Two of the three actions were removed to federal court, where summary judgments were granted in favor of the defendant on the basis of state court precedent insulating shippers from liability for the torts of their independent contractors. The court applied the outcome determinative test of Erie R.R. v. Tompkins, 304 U.S. 64 (1938) and in December 1970, the Tenth Circuit affirmed on the basis of the state court precedent. In 1974, two years after the Federal Court of Appeals had upheld the judgment of dismissal by the district court, the plaintiff whose action was not removed to federal court prevailed upon the state's highest court to overrule the precedent. Six months later, the federal court plaintiffs moved for relief from judgment. In June 1975, the Tenth Circuit, sitting en banc, granted relief under Rule 60(b)(6) on the ground that the divergent state and federal court results on identical claims "presented extraordinary circumstances" and that the disparate treat-

ment of plaintiffs who were forced to litigate in federal court would violate the Erie doctrine.

In the instant case, there is no state court precedent, but one could be easily obtained by certifying this unresolved question to the Washington State Supreme Court. This would obviate the necessity for a motion under CR 60(b)(6) in order to reconcile the divergence between State and Federal Court decisions which the constitutional principles articulated by Justice Brandeis in Erie R.R. v. Tompkins, 304 U.S. 64 (1938) mandate be extended to similar state law cases of this type.

B. The Ninth Circuit erroneously held the District Court acting in equity could not do equity to both parties.

The Ninth Circuit reversed the district court which fashioned a remedy under the principle that "He who seeks equity must do equity." Without discussing the primary underpinning for the district court's remedy, the Ninth Circuit Court found error. The Appellate Court in its Memorandum Decision ruled under Section III of its decision that "The district court erred by raising the ground rent absent fraud, accident or mistake. See Hedges vs.

Dixon County, 150 US 182, 189 (1893)." The district court **recognized and agreed** with this maxim of equity, but proceeded to increase to raise the ground rent under the principle that one must "do equity in order to get equity." Manufacturers Finance Company vs. McKey, 294 US 442, 449 (1935) et al. Neither the Ninth Circuit's Memorandum Opinion or its Order Denying Rehearing makes any comment as to why the district court erred in doing equity to both parties. Instead, the Ninth Circuit ruled that the court erred by raising ground rent absent fraud, accident or mistake. The district court had directly addressed this point in its Findings of Fact. The district court admitted that it could not do equity and raise the ground rent absent fraud, accident or mistake which it found absent in the instant case. The district court proceeded to do equity to the Petitioner on the more applicable ground that you must do equity in order to get equity. Incredibly, and without explanation, the Ninth Circuit found error and reversed the district court without even addressing this point, in any way! In fact, it staggers the imagination to try and understand how the Ninth Circuit could overrule the district court on this particular

point. Certainly it is impossible to imagine the Washington State Supreme Court concluding that a trial court could not do equity to both parties if it found a valid reason to grant equity to the party that sought it in the first place. The Petitioner can only pray the obviousness of the Ninth Circuit's error provides a basis for this court of last resort to act on this petition for certiorari.

The Federal District Court certainly recognized that, under the applicable Washington state law, it is a maxim of equity that he who seeks equity must do equity. Metropolitan Park District vs. State, 85 Wash. App. 821, 539 P2d 854 (1975); Queen City Farms vs. Central National Ins., 126 Wash. 2d 50 P.2d 1995. This is a second route to equity when a court cannot otherwise do equity to one party. Seattle vs. P.B. Investments, 11 Wash. App. 653, 524 P.2d 419 (1974).

This maxim may be applied in every kind of litigation and to every species of remedy. Pasco v. Napier, 46 Wash. App. 896, 733 P.2d 994 (1987). This is an historic maxim and a court of chancery has a duty to condition its grant of equitable relief. Erickson v. Erickson, 30 Wash. 2d 914, 194 P.2d 954 (1948).

"There are few cases in which courts of equity will insist on the maxim that he who seeks equity must do equity with more rigor than in suits for specific performance of contracts." Cascade Timber Co. v. Northern Pacific R.R. Co., 28 Wash. 2d 684, 184 P.2d 90 (1947).

If the appellate court's reversal of the trial court's decision is allowed to stand, equity to CONNELL will not be done in this case in which DOUGLASS sought and obtained specific performance.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted, and the case certified to the Washington Supreme Court to decide.

Respectfully submitted:

Frank Conklin

FRANK CONKLIN WSBA# 4325
RICHARD C. DULLANTY WSBA# 12967

APPENDIX

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

HARLAN D. DOUGLASS, and MAXINE H. DOUGLASS, Plaintiffs, vs. CHARLES F. CONNELL, JULIA K. CONNELL, VIRGINIA DULLANTY, and PATRICIA SCHULLER, Defendants, vs. UNITED STATES POSTAL SERVICE, Third Party Defendant	No. CS-93-335-FVS FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-referenced matter came on for trial before this court. Plaintiffs were represented by Joseph P. Delay; Defendants appeared through Richard C. Dullanty, Jr.; and Third-Party Defendant was represented by Assistant United States Attorney Joseph H. Harrington. Having heard the testimony, received the evidence,

APPENDIX

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

HARLAN D. DOUGLASS, and MAXINE H. DOUGLASS, Plaintiffs, vs. CHARLES F. CONNELL, JULIA K. CONNELL, VIRGINIA DULLANTY, and PATRICIA SCHULLER, Defendants, vs. UNITED STATES POSTAL SERVICE, Third Party Defendant	No. CS-93-335-FVS FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-referenced matter came on for trial before this court. Plaintiffs were represented by Joseph P. Delay; Defendants appeared through Richard C. Dullanty, Jr.; and Third-Party Defendant was represented by Assistant United States Attorney Joseph H. Harrington. Having heard the testimony, received the evidence,

and reviewed the record, the court makes the following:

FINDINGS OF FACT[1]

On October 6, 1970, Charles F. Connell and Julia K. Connell entered into an Assignable Ground Lease with the U.S. Postal Service for a term of 15 years (Ex. 1). The lease contained eight options to renew for five-year intervals. To exercise one of the eight options, the lessee had to deliver to the owner, by certified or registered mail, written notice of the renewal, and the notice had to be mailed to the owner at least 60 days prior to the commencement of a renewal period.

On May 24, 1971, the U.S. Postal Service assigned[2] the ground lease to Harlan D. Douglass and Maxine H. Douglas who had successfully bid to build a post office building on the property (Ex. 2). To finance construction of the post office building, the

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[1] The court also adopts the Agreed Facts listed in the Pre-Trial Order. There is no need to repeat them here.

[2] The parties dispute whether the Assignable Ground Lease is an assignment or a sub-lease. The court need not resolve that issue. For purposes of discussion only, the court will refer to the lease as an assignment.

Douglasses contacted Fidelity Savings. Fidelity Savings requested that the Douglasses exercise the first two five-year options on the 15-year Assignable Ground Lease as a security measure (Ex. 6).

On September 23, 1971, in recognition of the request of Fidelity Savings, the Douglasses mailed, by certified mail, a letter and attached document purporting to exercise the first two options of the Assignable Ground Lease (Ex. 7).

The Connells received the letter and attachment. They responded through their attorney, Richard E. Dullanty, by letter dated September 29, 1971 (Ex. 11). In this letter, Richard E. Dullanty noted that the Douglasses failed to sign the documents purporting to exercise the option, and asked the Douglasses to clear up the matter in a response. The Douglasses never replied to the letter from Richard E. Dullanty.

The Douglasses ultimately obtained financing through Bancshares Mortgage Co. (Ex. 12), which did not require that the Douglasses exercise the first two options on the Assignable Ground Lease. Bancshares Mortgage Co. financed $250,000 on the post office project. However, the total cost of the project was

$360,000 — $300,000 for the building and $60,000 for the overhead and site work. The Douglasses had to personally finance the remaining $110,000 of the project. Should the post office be forfeited, the Douglasses stand to lose the $110,000 original investment and $138,600 to $386,580 in expected return on that $110,000 investment. See Appendix A.

On January 22, 1973, the Douglasses entered into a "Building" Lease with the U.S. Postal Service whereby the Douglasses agreed to the construction of the post office building on the property covered by the Assignable Ground Lease (Ex. 16). In exchange, the U.S. Postal Service would lease the building from the Douglasses for $33,456 per year with rent increases up to a potential $46,000 per year should the U.S. Postal Service exercise all of the five-year options contained in the "Building" Lease.

In 1980, the Douglasses spent $111,930 on work to the post office building. Plaintiffs added a new furnace, heat/air conditioning, tile, paint, and gas pump in exchange for relief from maintenance (except maintenance of the structure and roof). Should the post office be forfeited, the Douglasses could lose from

$87,360 to $243,850 in expected return, plus the $111,930 investment. See Appendix A.

In 1985, the Douglasses expended about $11,000 to re-roof the post office building. Again, the Douglasses may lose from $5,940 to $17,755 in expected return, plus the $11,000 investment, if forfeiture of the post office occurs. See Appendix A.

By letter dated February 5, 1987, the Douglasses properly exercised the first five-year option on the Assignable Ground Lease (Ex. 22). The exercise of the first option renewed the Assignable Ground Lease through December 31, 1992. On August 21, 1991, the U.S. Postal Service properly exercised its second five-year option on the "Building" Lease, extending the "Building" Lease through December 31, 1997 (Ex. 26).

In December 1987, the Douglasses paid off the $250,000 mortgage on the post office (Ex. 23). However, they received no return on their investment up to that point. The mortgage payment to the bank and the ground rent to the Connells equalled the amount of rent received by the Douglasses from the U.S. Postal Service. In essence, the Douglasses received nothing for the first

15 years of the ground lease.

The Douglasses contend that they exercised the second five-year option on the Assignable Ground Lease by a letter dated September 4, 1991 (Ex. 27). Notice of the exercise of the second five-year option was due by November 1, 1992.

However, no evidence establishes that the September 4, 1991 letter was ever delivered to Julia Connell[3] as per the requirements of the Assignable Ground Lease. The Douglasses possess no return receipt indicating that the letter was delivered to Julia Connell; nor does the Post Office have any record of a September 4, 1991 letter being sent by certified mail from the Douglasses to Julia Connell.

On April 22, 1993, John F. Estey, an employee of the Douglasses, sent a memorandum to Julia Connell noting that the rent on the Assignable Ground Lease had increased beginning January 1, 1993 from $475 to $487.50 per month (Ex. 28). This

[3] Charles F. Connell died in 1976. His interest in the subject property passed to his daughters, Virginia Dullanty and Patricia Schuller, subject to a life estate in favor of Julia K. Connell.

must have triggered a review of the Assignable Ground Lease by Julia Connell, for on May 12, 1993, Julia Connell through her attorney, Richard E. Dullanty, notified the Douglasses that the Assignable Ground Lease was terminated effective June 30, 1993 for failure to renew.[4] As a result, according to the terms of the Assignable Ground Lease, the property, with all of its buildings, structures, and improvements, vested in Julia Connell as owner (Ex. 30).

On May 13, 1993, Harlan Douglass telephoned Richard Dullanty to discuss the matter. Harlan Douglass faxed a copy of the September 4, 1991 renewal letter to Richard Dullanty while the two spoke on the telephone. Apparently, Richard Dullanty refused to recognize the faxed letter as a proper and timely exercise of the second option.

By certified letter dated July 27, 1993, the U.S. Postal

[4] Technically, the Assignable Ground Lease terminated on December 31, 1992 for failure to renew. Defendants contend that a month-to-month tenancy was created thereafter. They further state that they ended the month-to-month tenancy by proper notice. The court need not resolve this issue.

Service notified the Douglasses that all future rents on the "Building" Lease would be paid to Julia Connell, since the Assignable Ground Lease had expired for failure to renew. To the time of trial, Julia Connell has received rent from the U.S. Postal Service in the amount of $3,458.33 per month since August 1993. The Douglasses have paid the ground rent of $487.50 per month into the Registry of the Spokane County Superior Court for rent owing through December 1, 1993. Subsequent ground rent payments have been tendered to Julia Connell, but she has refused to accept them.

From these Findings of Fact, the court makes the following:

CONCLUSIONS OF LAW

I. THE SECOND FIVE-YEAR OPTION ON THE ASSIGNABLE GROUND LEASE WAS NOT PROPERLY EXERCISED.

Plaintiffs make two arguments: First, they contend that they properly exercised the first two options on the Assignable Ground Lease by their certified letter dated September 23, 1991,

thereby extending the lease through 1997. Second, they argue that they properly exercised the second five-year option on the Assignable Ground Lease by their alleged letter dated September 4, 1991, thereby extending the lease through 1997.[5] Both arguments fail. The lease was not properly renewed through 1997.

In order to obtain financing, the Douglasses sought to exercise the first two five-year options on the Assignable Ground Lease by certified letter dated September 23, 1971.[6] "The notice of election to take advantage of an option to extend or renew a lease must indicate a definite, unequivocal, and unqualified determination on the part of the lessee to exercise his option." Jones v. Dexter, 48 Wash.2d 224, 226, 292 P.2d 369 (1956); accord Wharf Restaurant v. Port of Seattle, 24 Wash. App. 601, 610, 605 P.2d 334 (1979). Plaintiffs' attempt to exercise the first

[5] There is no dispute that the Douglasses properly exercised that first five-year option by certified letter dated February 5, 1987, extending the lease through 1992.

[6] Evidence of this letter was not disclosed to Defendants until January 1994. Plaintiffs claim that they knew the letter existed, they just failed to disclose this fact because they could not locate their copy.

two options was not definite, unequivocal, or unqualified. Neither the letter nor the attachment exercised the options.

As to the cover letter, there is little or no evidence that the cover letter dated September 23, 1971 was ever signed.[7] There was no testimony that it was signed and none of the copies are signed.

Furthermore, the Douglasses qualified the cover letter by affixing an attachment. They declared in the cover letter that the attachment states their intention to exercise the option. They also requested the Connells, as lessors, to sign the attachment and return it to the Douglasses. By requiring a further action, the Douglasses did not manifest an unqualified intention to exercise the first two options solely by the cover letter dated September 23, 1971; it was the attachment that was to exercise the options.

However, the attachment to the September 23, 1971 letter also failed to exercise the options. It is indefinite, equivocal, and

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[7] Under Washington's Deadman Statute, the court prohibited Harlan Douglass from testifying about signing the letter since Charles Connell, now deceased, would not be able to testify in rebuttal. See RCW 5.60.030.

qualified. It contains the appropriate language — "The undersigned hereby exercise" — but is was not signed. The Douglasses neglected to sign the attachment before mailing it to the Connells. A signature symbolizes the solemnity of an action. A failure to sign a document, in the present context, most likely discloses doubt.

Additionally, the Douglasses requested that the Connells sign the attachment first, then return it to the Douglasses for their signature. The Douglasses would then mail an "executed copy" to the Connells for their files. Thus, the attachment in its current form must have been "unexecuted." The lack of Plaintiffs' signatures on the attachment gives to no effect.

"The notice of election must be as binding on the lessee as on the lessor, and must be in such terms that the lessee cannot escape liability should he subsequently decide not to keep the premises for the extended term." Jones, 48 Wash.2d at 227. If the tables were turned, and the Douglasses wanted to be released from the lease obligation, the court believes that the Douglasses could fervently argue that the failure to sign the attachment evinced

an equivocation and uncertainty on their part so as to defeat the exercise of the option. The Douglasses could have easily signed the attachment before mailing it to the Connells. That would have demonstrated their unequivocal intention to exercise the options. However, the lack of their signatures on the attachment makes the attachment unenforceable as an exercise of the options.

Actions after the mailing of the September 23, 1971 letter and attachment further substantiate their ambiguity. The Connells, through their attorney, Richard E. Dullanty, mailed a letter dated September 29, 1971 to the Douglasses regarding the effectiveness of the September 23, 1971 cover letter and attachment. The Douglasses ignored the attorney's letter and declined to clarify the situation. They claim that the signed cover letter exercised the options based on the interpretation of the exercise provision of the lease contained in the letter of Richard E. Dullanty. However, the letter from Richard E. Dullanty stated that the signatures of both Harlan and Maxine Douglass were necessary on a letter; at most, only Harlan Douglass signed the cover letter dated September 23, 1971 (although no concrete proof exists to that effect). Had the

Douglasses truly intended to exercise the first two options, they surely would have contacted Richard E. Dullanty and resolved any potential confusion.

In addition, the Douglasses acted inconsistently with the exercise of the first two five-year options by re-exercising or attempting to re-exercise the same options. In 1987, the Douglasses properly exercised the first option by certified letter dated February 5, 1987. The Douglasses also contend that they properly exercised the second option by an alleged letter dated September 4, 1991. If the Douglasses really believed that they had exercised the first two options back in 1971, there would have been no need to exercise the options again in 1987 and 1991.

The Douglasses claim that they could not find their copy of the 1971 letter and attachment. Therefore, they allege, to be safe, they mailed the 1987 and 1991 letters to re-exercise the options. Whether they had a copy of the 1971 letter and attachment would not have changed the legal effect of the 1971 exercise of the first two-options — if the exercise was valid. A simple telephone call to their attorney would have confirmed as much.

Moreover, the Douglasses could have contacted the Connells and asked for a copy of the 1971 letter and attachment. By sending the 1987 letter, and by attempting to send the 1991 letter, the Douglasses confirmed this court's present belief that the September 23, 1971 letter and attachment did not exercise the first two five-year options on the Assignable Ground Lease.

In addition to the September 23, 1971 cover letter and attachment, the Douglasses also argue that the September 4, 1991 letter renewed the Assignable Ground Lease through 1997. Paragraph 6 of the Assignable Ground Lease provides: "The option of renewing this lease shall be exercised by causing to be delivered to the owner, by certified or registered mail, written notice of renewal and said notice shall be mailed to the owner at least sixty (60) days prior to commencement of such renewal period." No evidence exists that a September 4, 1991 renewal letter was ever delivered to Julia Connell.

The plaintiffs have no return receipt indicating that the letter was delivered and signed for by Julia Connell. In addition, the U.S. Post Office has no record of a certified letter being

mailed from the Douglasses to Julia Connell on or about September 4, 1991. There is no record by the Post Office that the letter was delivered, or that the letter was returned to sender for an incorrect address. Simply put, there is no proof that this letter was ever mailed or delivered to Julia Connell. Therefore, in accordance with the requirements of the Assignable Ground Lease, the Douglasses failed to properly exercise the second five-year option to renew by failing to deliver notice to Julia Connell 60 days before the commencement of a new renewal period. Under the law and the lease, the property and improvements, including the post office building, vested in Julia Connell. Nevertheless, equity must intrude to protect the Douglasses against such a substantial forfeiture.

II. EQUITY MANDATES SPECIFIC PERFORMANCE IN FAVOR OF PLAINTIFFS ON THE SECOND FIVE-YEAR OPTION.

According to Paragraph 22 of the Assignable Ground Lease, at the termination of the lease, title to the premises and all buildings, structures and improvements thereon, shall vest in the

owner. Since the lease technically terminated on December 31, 1992 for failure to renew, the post office building vested in Julia Connell. However, as an alternative theory, Plaintiffs contend that, even if they failed to properly renew the Assignable Ground Lease, equity should intervene and prevent the inequitable forfeiture of the post office building to Julia Connell.

"Equity abhors a forfeiture." Harlan v. McGraw, 107 Wash. 286, 292, 181 P. 882 (1919); accord Esmieu v. Hsieh, 20 Wash. App. 455, 460, 580 P.2d 1105 (1978). "[T]here can be special circumstances which may warrant a court in granting equitable relief against a lessee's failure or delay in giving notice to renew an option in its lease." Wharf Restaurant, 24 Wash. App. at 610-11.

In Wharf Restaurant, the lessee, through simple forgetfulness, failed to exercise an option to renew a lease. Id. at 603. The lessee attempted to remedy the failure, upon discovery, but to no avail. The lessor entered into another lease with a different lessee. Id. at 604. The appellate court applied a five-part test in finding, in equity, that the trial court properly ordered specific

performance of the old lease with the original lessee, despite the late notice of the intention to renew. Id. at 612.

First, the failure to give notice was purely inadvertent. Id. "It was not the result of intentional, culpable or, as some courts refer to it, 'grossly negligent' conduct." Id. Second, had equity not intervened, an inequitable forfeiture would have occurred. Id. Permanent improvements had been made on the premises by the lessee. Id. Third, the lessor was not prejudiced, nor did it change its position, despite the lack of timely notice of renewal. Id. The court did not consider the re-leasing of the property to a new tenant to be prejudicial to or a change in position by the lessor. Fourth, the lease was for a long term. Id. at 613. The lessee had leased the property for over twenty-five years. Id. Finally, no undue delay was present in giving notice. Id.

Applying that same test to the present case, this court concludes that equity favors specific performance of the Assignable Ground Lease notwithstanding Plaintiffs' dilatory notice of intent to renew. Plaintiffs' failure to give timely notice of the exercise of the second option was inadvertent.

The Douglasses thought they had renewed the lease by letter dated September 4, 1991. Once they learned of their default on or about May 13, 1993, Harlan Douglass immediately telephoned Richard E. Dullanty, attorney for Julia Connell, to remedy the situation. While on the telephone, Harlan Douglass faxed a copy of the September 4, 1991 letter exercising the second five-year option to Richard E. Dullanty. Such actions do not evidence an intention not to renew the lease.

Moreover, the post office building has a life expectancy of at least 50 years. The Assignable Ground Lease had only been in effect 15 years, plus the first 5 years of the option period. It seems inconsistent that the Douglasses would intentionally abandon their post office building after only 20 years. They had not even recouped their investment, assuming a reasonable rate of return. Additionally, the Douglasses already renewed the first option in 1987. Had they intended to relinquish the building, the Douglasses could have done so after the expiration of the original term of the lease without exercising the first option. By exercising the first option, an inference arises that the Douglasses intended to

exercise the second option.

Plaintiffs may have been careless in failing to properly exercise the second option, especially in failing to ascertain whether they received a return receipt, but they were not "grossly negligent." Plaintiffs' default was simply inadvertent.

Second, an inequitable forfeiture would result if equity does not intervene. Plaintiffs made valuable, permanent improvements to the property. They build a post office costing $360,000; the building itself cost $300,000 and the overhead and site work cost an additional $60,000. Bancshares Mortgage Co. financed only $250,000 of the construction project; the Douglasses had to personally finance the remaining $110,000 of the project.

The Plaintiffs paid off the $250,000 mortgage in December 1987, but received no return on their investment up to that point.[8] The mortgage payment to the bank and the ground rent to the Connells equalled the amount of rent received by the Douglasses from the U.S. Postal Service. In essence, the Douglasses received no-

[8] However, from 1988 to the present, the Douglasses have earned about $174,000 in expected return. See Ex. 45.

thing for the first 15 years of the ground lease. If the post office was now forfeited, the Douglasses would lose their $110,000 investment plus return on that investment; a possible loss in interest alone of over $386,580 (applying 6% compound interest. See Appendix A.

Moreover, in 1980, the Douglasses spent $111,930 in repair work to the post office building. Plaintiffs added a new furnace, heat/air conditioning, tile, paint, and gas pump in exchange for relief from maintenance (except maintenance of the structure and roof). A forfeiture would cost the Douglasses their investment of $111,930 plus a possible $243,850 in interest. See Appendix A.

Additionally, in 1985, the Douglasses expended about $11,000 to re-roof the post office building. A forfeiture would further cost the Douglasses approximately $17,755 in expected return plus the $11,000 investment. See Appendix A. In totalling the possible loss facing the Douglasses, they stand to lose over $707,000 on their investment in the post office in question ($881,000 minus $174,000, the amount they have already recouped on their investment. See Ex. 45. Regardless of the exact

numbers, it is clear that any forfeiture would be substantial.

Defendants invested and risked very little; Plaintiffs invested and risked much. Plaintiffs have yet to recoup their expected return on their investment, using either simple interest or compound interest. It would certainly be inequitable for Defendants to gain such a windfall merely because of Plaintiffs' untimely service of their notice of renewal of the lease. Equity must intervene.

Third, Julia Connell has not changed her position, or been prejudiced, by the failure to give timely notice of renewal. She has made no improvements on the land; she has not sold the land; she has not renegotiated the "Building" Lease with the U.S. Postal Service; nor has she even re-leased the property to a different party, as the lessor had done in Wharf Restaurant. Julia Connell has simply collected the rent under the "Building Lease since August 1993.

Julia Connell did not notice the failure of the Douglasses to timely exercise the second option until May 1993. Nearly six and a half months passed from the termination of the lease on

December 31, 1992 before Julia Connell discovered the default. The Douglasses attempted to remedy the default immediately upon learning that they were in default. A very short time elapsed between Julia Connell's discovery of the default and the attempt by the Douglasses to remedy that default. Surely, Julia Connell could not have changed her position in such a short time.

The Assignable Ground Lease was for a long term, not a short terms. The lease was for 15 years with eight five-year renewal options. Presumably, the lease could survive for 55 years.

The last factor, undue delay, is the most troublesome. Notice as due by November 1, 1992; notice was given on May 13, 1993, when Harlan Douglass telephoned Richard E. Dullanty and faxed a copy of the September 4, 1991 letter exercising the second opinion. The notice was six and a half months late.[9] Nonetheless, the delay was inadvertent and not undue. Julia Connell did not even realize the failure to renew until May 1993, at which time the

[9] The court in Wharf Restaurant opined that a two-month delay in exercising an option would be so excessive as to not justify the intervention of equity. Id. However, the court provided no reason why such a delay would prevent the intervention of equity.

Douglasses attempted to exercise the second option. Moreover, the Douglasses thought they had already exercised the option, unlike the lessees in Wharf Restaurant, who simply forgot to exercise the option. In balancing all five factors, the clear weight militates toward a finding for the Plaintiffs in equity. Accordingly, the court will order specific performance of the second five-year option, thereby extending the lease through 1997.[10]

However, the court will do equity for Julia Connell as well. The rent she earns from the Douglasses on the Assignable Ground Lease is far below the current fair market value of the land. It was Plaintiffs' conduct that led to this lawsuit. Their failure to properly comply with the terms of the Assignable

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[10] The parties also reference Heckman Motors v. Gunn, 73 Wash. App. 84 (1994), in which the appellate court affirmed the trial court's refusal to excuse the untimely exercise of a lease renewal option through equity. In so holding, the court emphasized that the lessee would not forfeit substantial, valuable improvements. Id. at 88. In fact, the lessor had invested more into the property than the lessee.

Here, by contrast, the Plaintiffs have invested everything into the subject property, while the Defendants have invested nothing. The Douglasses stand to lose substantial, valuable improvements worth more than $300,000 if equity does not intervene in their behalf. Heckman Motors is clearly distinguishable.

Ground Lease has forced the court to intervene, in equity, to prevent an inequitable forfeiture. In exchange for doing equity towards the Douglasses, the court will do equity toward Julia Connell by increasing the rent paid by the Douglasses on the Assignable Ground Lease to the current fair market rental value of the property.

It is well-settled that a court acting in equity may not change or refuse to enforce the terms of a contract, absent fraud, accident or mistake. See Hedges v. Dixon County, 150 U.S. 182, 192 (1893); In re Four Seasons Nursing Centers, Inc., 483 F.2d 599, 603 (10th Cir. 1973); Anderson v. Ferguson, 17 Wash.2d 262, 275, 135 P.2d 302 (1943). No allegation of fraud, accident, or mistake in the making of the Assignable Ground Lease is evident in this case. Nonetheless, "there is no question but that equity has a right to step in and prevent the enforcement of a legal right whenever such an enforcement would be inequitable . . . ." Malo v. Anderson, 62 Wash.2d 813, 815, 384 P.2d 867 (1963) (quotations omitted). The court is totally justified in altering the inequitable rental payment provisions of the Assignable Ground

Lease to create a more equitable result.

He who seeks equity must do equity. See Coy v. Raabe, 69 Wash.2d 346, 351, 418 P2d 728 (1966). "If [Plaintiff] asks no favors, he need grant none. But, if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity." Manufacturers' Finance Co. v. McKey, 294 U.S. 442, 449 (1935) (quotations omitted).

The Douglasses have called upon this court to grant them equitable relief. Technically, under the terms of the Assignable Ground Lease, the premises and improvements thereon vested in Julia Connell upon the termination of the lease for failure to properly renew. The Douglasses did not lawfully exercise the second five-year option to renew either through the 1971 letter or the 1991 letter. To avoid an inequitable forfeiture, the court has intervened to order specific performance of the second five-year option.

It seems only fair that one who seeks equity must do equity. The current rent paid to the owner on the Assignable Ground

Lease is grossly undervalued. The testimony at trial indicates that the rent paid could be as little as one-third of the true fair market rental value.

Accordingly, the court orders the parties to meet before a mediator picked by the parties to decide upon an equitable rent based on the fair market rental value of the subject property.

In conclusion, the court finds that neither the September 23, 1971 letter and attachment, nor the September 4, 1991 letter, properly exercised the second five-year option. Nevertheless, equity dictates that the court intervene and order specific performance of the second five-year option to rent an inequitable forfeiture. Accordingly,

IT IS HEREBY ORDERED:

1. The second-year option on the Assignable Ground Lease shall continue as if the Douglasses gave proper notice to renew under the second option.

2. The parties shall promptly meet, confer, and select a mediator to determine a fair market rental value for the ground lease paid by the Douglasses. If the parties cannot mutually select

a mediator, the parties shall submit a list of three names from which this court will select the mediator. The mediator shall consider such evidence as he or she deems appropriate to determine what change should be made to the rent paid to the land owner. That rent change shall be retroactive to January 1, 1993 and continue to the conclusion of the Assignable Ground Lease. In considering such evidence, the mediator should bear in mind the fair market value to the property and any constraints imposed upon Plaintiffs by the "Building" Lease with the U.S. Postal Service, particularly the percentage rent increase in the "Building" Lease. The mediator shall advise the court of its determination so that it may be included in the court's judgment. The court will review the mediator's determination upon request by either party. Notice of such review shall be filed within 10 days of receipt of the mediator's decision. Cost of the mediation shall be borne equally by both parties.

3. In accordance with the court-ordered exercise of the second option on the Assignable Ground Lease, each party shall remit all rents appropriately owing to the other party. The

Douglasses shall refund the total adjusted ground rent from January 1993 to the present rightly owing to Julia Connell; Julia Connell shall refund the total building rent (received from the U.S. Postal Service) from August 1993 to the present rightly owing to the Douglasses. Each party shall inform the court in writing of the exact amount to be returned to the other party so that amount can be made part of the judgment. The total amount of adjusted ground rent owing to the land owner should be based on the mediator's determination.

4. The leasehold interest of the U.S. postal Service in the post office building remains in full force, unaffected by this action.

5. No party shall recover interest.

6. Each party shall pay its own attorney fees and costs.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and furnish copies to counsel.

DATED this 21 day of September 1994.

/S/

FRED VAN SICKLE
United States District Judge

APPENDIX A

Expected Return on Post Office Investment

Using 6% simple interest:

1) Original $110,000 investment
$110,000 investment
$138,600 interest return

$248,600

2) Work to post office (1980)
$111,930 investment
$199,290 interest return

$311,220

3) Re-roof work (1985)
$ 11,000 investment
$ 5,940 interest return

$16,940 Total: $576,760

Using 6% compound interest:

1) Original $110,000 investment
$111,000 investment
$386,580 interest return

$496,580

APPENDIX A (cont'd)

2) Work to post office (1980)

$111,930 investment
$243,850 interest return

$355,780

3) Re-roof work (1985)

$ 11,000 investment
$ 17,755 interest return

$ 28,755 Total: $881,115

See Ex. 44 & 45.

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Party Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

HARLAN D. DOUGLASS and MAXINE H. DOUGLASS, husband and wife, Plaintiffs, vs. CHARLES F. CONNELL and JULIA K. CONNELL, husband and wife, and JULIA K. CONNELL, individually as successor-in-interest; VIRGINIA DULLANTY, and PATRICIA SCHULLER, each as their separate property, Defendants/Third Party Plaintiffs, vs. UNITED STATES POSTAL SERVICE, Third Party Defendant.	NO. CS-93-0335-FVS PRE-TRIAL ORDER (Fed.R.Civ.P.16; LR 16)

PRE-TRIAL ORDER

A pre-trial conference was held in the above entitled cause at Spokane, Washington on June 6, 1994 with Judge Fred L. Van Sickle presiding. Plaintiffs, Harlan and Maxine Douglass (hereinafter referred to as "Douglass") were represented by Joseph P. Delay; Defendant/Third Party Plaintiffs, Charles F. and Julia K. Connell et al. (hereininafter referred to as "Connell") were represented by Richard C. Dullanty, Jr.; Third Party Defendant, United States Postal Service (hereinafter referred to as "Postal Service") was represented by Joseph H. Harrington, their respective attorneys of record. The following pre-trial order has been formulated and settled as follows:

NATURE OF PROCEEDINGS

AND STATEMENT OF JURISDICTION

This was an action brought by Douglass originally in Spokane County, Washington Superior Court sounding in contract and landlord tenant. Connell brought in the Postal Service as a Third Party Defendant and, pursuant to federal statute, the Postal Service removed the action to the U.S. Federal District Court for Eastern

Washington. All parties agree that jurisdiction and venue are proper.

The proceeding is essentially a dispute among the parties as to whether or not Douglass exercised a contractually required renewal of a ground lease with Connell. The action also includes a lease arrangement for a building on said property between Douglass and the Postal Service.

AGREED FACTS

The following facts were agreed upon by the parties and require no proof:

1. Harlan D. Douglass was at all times herein married to Maxine H. Douglass.

2. Charles F. Connell was at all times herein married to Julia K. Connell. Charles F. Connell passed away on July 25, 1976. His interest in the subject property passed to Virginia Dullanty, a daughter, and Patricia Sshuller, a daughter, subject to a life estate in favor of Julia K. Connell.

3. Julia K. Connell now lives at East 2903

25th Avenue, Apartment #217, Spokane, Washington 99223. She moved there on May 1, 1991 from her former address of South 1010 Rockwood, Apartment #107, Spokane, Washington 99202. She moved to the Rockwood address in 1978. Prior to 1978, she lived at East 304 14th Avenue for one year. Prior to that, she lived at East 113 Sumner, Apartment 13, Spokane, Washington 99202. She lived at the Sumner address from 1940 to 1977. Julia Connell received rent and correspondence at her new address of East 2903 25th Avenue, Apartment #217 beginning May 7, 1991.

4. The real property which is the subject matter of this litigation is legally described as follows:

> Lots 1, 2, 3, 4, 5, and 6, in Block 1, of Wadsworth and McDonald Addition to Spokane Falls (now Spokane), in the City of Spokane, County of Spokane, State of Washington.

The property consists of a Postal Service building constructed on the aforesaid real property constructed in 1972. The address of the subject Postal Service building is East 1602 Sprague Avenue, in the City and County of Spokane, State of Washington. The Postal Service building and the subject real property consists of one

masonry building approximately 7,825 square feet and a parking area of approximately 22,250 square feet, together with driveway, sidewalks and landscape area.

5. On October 6, 1970, Connell, as Lessor, entered into an Assignable Ground Lease, Exhibit 1, with the Postal Service, as Lessee, for a term of fifteen (15) years at an annual rent of $5,500 payable in equal monthly installments. The Assignable Ground Lease commenced January 1, 1973; see Exhibits 1 and 19. The Lease contained eight (8) options for five (5) separate five-year renewals at various rent increases. The first five-year renewal became effective January 1, 1987 and expired on December 31, 1992. The second five-year renewal would have begun January 1, 1993 and would have terminated on December 31, 1997.

6. On May 24, 1971, the Postal Service, as Lessee, assigned its interest as Lessee, in the aforesaid Assignable Ground Lease to Douglass by written assignment, Exhibit 2. The reason the Assignable Ground Lease was assigned to Douglass was

that Douglass had successfully bid to construct a Post Office building on the subject real property. Douglass was notified by telegram dated May 25, 1971 that his bid was accepted to construct the postal improvements on the subject real property.

7. On June 9, 1971, Douglass received a letter, Exhibit 4, from the Postal Service officially accepting his bid. This letter was received by Douglass on or about two to three days following June 9, 1971. On July 1, 1971, Douglass notified Connell by letter that he was accepting the terms of the Assignable Ground Lease from the Postal Service and that it was assigned to Douglass.

8. On January 22, 1973, Douglass entered into a Lease with the Postal Service, Exhibit 16, and, pursuant to the terms of said Lease, constructed a Post Office building as herein described. The terms of Douglass' Lease with the Postal Service was for a term of fifteen (15) years with five (5) separate five-year renewal options. That Lease commenced January 1, 1973. The monthly rent from the Postal Service is $3,458.34. The Post-

al Service reimburses the Lessor for real estate taxes. From the rent proceeds, Douglass paid the amount of $475 per month to Connell, as the alleged ground rent each month, through April 1993. The Ground Lease required $487.50 per month beginning January 1, 1993.

9. Beginning in 1971, Douglass sought financing on the postal building that he was then in the process of constructing on the subject property. Douglass contacted Fidelity Savings, and Fidelity Savings requested from Douglass that Douglass renew the first two (2) five-year options on the Assignable Ground Lease in order to qualify for financing with Fidelity. A copy of the letter from Fidelity Savings and Loan, dated September 13, 1971 and making such request, is Exhibit 6. Douglass obtained his financing from Bancorp Mortgage and did not finance through Fidelity. The mortgage was for a 15-year term.

10. On September 23, 1971, Douglass mailed to Connell in writing by certified mail, return receipt, Exhibit 7. The only response to Exhibit 7 was Exhibit 11 which is a letter

from Richard E. Dullanty to Harlan Douglass dated September 29, 1971. There was no other conduct or communication between Douglass and Connell, directly or indirectly, except as indicated in the exhibits, from September 29, 1971 through April of 1993.

11. Paragraph 6 of the Ground Lease between Connell and Douglass provides as follows:

> 6. The option of renewing this Lease shall be exercised by causing to be delivered to the owner, by certified or registered mail, written notice of renewal and said notice shall be mailed to the owner at least 60 days prior to the commencement of such renewal period.

12. The Postal Service gave notice of renewal of its Lease with Douglass on August 21, 1991 for a renewal for an additional five-year term commencing January 1, 1993 at the then rate of $41,500. This was the second renewal by the Postal Service. This extended the Lease between Douglass and the Postal Service to December 31, 1997. The present monthly rent paid by the Postal Service is $3,458.34. The monthly rent for the five-year term commencing January 1, 1993 was to increase from $475

per month to $487.50 per month according to the Assignable Ground Lease, Exhibit 1. The actual amount of rent paid for January through April 1993 was $475 per month.

13. Since July 1, 1993, Connell demanded the rental payment to Douglass be terminated and Connell has collected the rent directly from the Postal Service. The rent is in the sum of $3,458.34 per month. The July rent was received by Douglass in the amount of $3,458.34 and is still being held by him. Douglass has also paid all ground rent alleged to be due to Connell through the Registry of the Spokane County Superior Court prior to the above-entitled case being transferred into Federal Court of the Eastern District of Washington, which includes December 1, 1993 rent. Following the transfer of the above-entitled case into Federal Court, Douglass has paid to his attorney the monthly Assignable Ground Lease payments who, in turn, tendered it to Connell's attorney who, in turn, has returned it. The rent per month being tendered is $487.50. Postal Service has never sent a written notice of intent to renew the Postal Service/

Douglass Lease to Connell.

14. Postal Service informed Douglass by certified letter dated July 27, 1993, Exhibit 34, that, because Douglass' tenancy had expired, all future rents would be paid by Postal Service directly to Connell.

15. As of July 1993, the Postal Service Station B, Liberty Park, East 1602 Sprague, Spokane, Washington 99202 under its records for registered and certified mail, which it maintains for the entire City of Spokane on Form PS 3849, can find no record of the September 4, 1991 letter having come through the facility, been delivered or returned.

16. A Lis Pendens was filed on July 16, 1993.

PLAINTIFFS' CONTENTIONS

Plaintiffs' contentions as to disputed issues are:

1. That the Assignable Ground Lease was renewed on September 23, 1971 and that Lease therefore continued until December 31, 1997.

2. The Assignable Ground Lease was re-

newed by letter from Douglass to Connell dated September 23, 1971 until December 31, 1997.

3. Through oversight, the Assignable Ground Lease was again further renewed by giving of additional notice of intent to renew by letter dated February 5, 1987, renewing the Assignable Ground Lease from January 1, 1987 to December 31, 1992. Douglass could not find the September 23, 1971 letter until January of 1994.

4. Through oversight, the Assignable Ground Lease was again renewed by giving of additional notice of intent to renew by letter dated September 4, 1991, renewing the Assignable Ground Lease from January 1, 1993 to December 31, 1997.

5. All notices of intent to renew were sent by certified mail, return receipt; however, as to the September 4, 1991 notice, there is no proof of delivery.

6. Douglass is entitled to have the Assignable Ground Lease as extended specifically enforced.

7. Douglass, in any event, is entitled to equitable relief because of the improvements constructed on the subject Ground Lease. Otherwise, Connell would be unjustly enriched.

8. Connell is estopped to deny that the 1971 notice of renewal was ineffective to renew the Assignable Ground Lease through December 31, 1997.

9. Douglass' certified notice of intent to renew dated September 4, 1991 constitutes a valid renewal even though the notice may not have been received by Connell.

10. Douglass has made a good faith effort to comply with all terms of the Assignable Ground Lease.

11. Douglass is entitled to recover the rent from Connell which the Postal Service has paid to Connell commencing with the payment of August 1, 1993 until the present date together with interest at the rate of twelve percent (12%) per annum from date of each rental pay-

ment.

12. Connell is entitled to receive the Assignable Ground Lease rent which Douglass has paid into the Registry of Spokane County Superior Court through December 31, 1993. The rent on the Assignable Ground Lease is $487.50 per month. Douglass tendered the $487.50 per month from July 1, 1993 through December 31, 1993 into the Registry of Spokane County Superior Court. The subsequent tender from Douglass' attorney was made to Connell's attorney from January 1, 1994 to the present date. This tender has been rejected by Connell's attorney. There is also due to Connell from Douglass the Assignable Ground Lease of $487.50 from January 1, 1994 through June 30, 1994, or a total sum of $2,925.

13. Douglass is entitled to a Declaratory Judgment declaring that the Assignable Ground Lease was extended by Douglass through December 31, 1997.

DEFENDANTS'/THIRD PARTY PLAINTIFFS' CONTENTIONS

Defendants'/Third Party Plaintiffs' contentions as to disputed issues are:

1. The 1971 documents alleged by Douglass did not, even if mailed and received, satisfy the contractually required notice in that the documents were not sufficiently clear and unequivocable, should be construed against Douglass, that they were in violation of the requirements of the statute of frauds, and cannot be enforced through the equitable theories of laches and equitable estoppel.

2. That the alleged letter dated September 4, 1991 was either a fabrication, or was not mailed by certified or registered mail, and was not delivered to Connell, as required by the contract and the statute of frauds.

3. That Douglass is not entitled to any equitable relief because of the absence of conduct by Connell.

4. That, because Douglass failed to properly exercise his option to renew for the renewal period beginning January 1, 1993, the Assignable Ground Lease terminated by its own terms on January 1, 1993.

5. That the Building Lease between Postal Service and Douglass is a sublease of the Assignable Ground Lease, and terminated at the same time the Assignable Ground Lease itself terminated for nonrenewal.

6. That the Postal Service is liable to Connell for rent on the month-to-month tenancy of the building for the month of July 1993 in the amount of $3,458.34 plus interest from July 1993.

7. That Connell is entitled to an order declaring the Assignable GroundLease and the Building Lease both expired on January 1, 1993 for Douglass' failure to properly exercise the option to renew.

8. Should the Court decide it has both the authority and a proper basis to extend the Ground Lease

through equity, equitable principles should be extended in favor of Connell raising rental payments to fair market value and limiting the term of the renewal.

THIRD PARTY DEFENDANT'S CONTENTIONS

Third Party Defendant's contentions as to disputed issues are:

1. That the Building Lease between Postal Service and Douglass is not a sublease of the Assignable Ground Lease.

2. That, if the Assignable Ground Lease expired by its own terms, the provisions of the Building Lease are still in full force.

3. That Connell et al. are "successors in interest" to Douglass in the Building Lease, and are therefore bound by the terms of the Building Lease.

4. Postal Service claims it is entitled to the benefits of its Lease on the same terms and conditions, regardless of the outcome of the litigation between Douglass

and Connell.

ISSUES OF FACT

The following are the issues of fact to be determined by trial:

1. Did the purported letters of September 23, 1971, Exhibit 7, comply with the contractual requirements of ¶6 of Exhibit 1?

2. If the Assignable Ground Lease was not renewed by the September 23, 1971 documents, did the September 4, 1991 letter by Douglass, exhibit 27, satisfy the contractual requirements of ¶6 of the Assignable Ground Lease?

3. Were the alleged letters of September 23, 1971, Exhibit 7, signed?

4. If Douglass made a good faith effort to comply with all terms of the Assignable Ground Lease, does this allow him to receive equitable relief?

5. Did the alleged letter of 1971 provide a

clear and unequivocable notice of intent to renew?

6. Did the alleged renewal letter of September 4, 1991, Exhibit 27, ever get mailed by certified or registered mail?

7. Would either party be entitled to interest? If so, what rate?

ISSUES OF LAW

The following are the issues of law to be determined by the Court.

1. Does the statute of frauds apply to the alleged notices of intent to exercise the options to renew under the Assignable Ground Lease?

2. Is Douglass entitled to a decree specifically enforcing the Assignable Ground Lease?

3. Is Douglass entitled to a declaratory judgment declaring the Assignable Ground Lease to be valid through December 31, 1997?

4. Are any of the parties entitled to equity

under the facts and circumstances herein?

5. Did Douglass properly comply with the contractual requirements of ¶6 of the Assignable Ground Lease?

6. Is Connell estopped to deny that the Assignable Ground Lease has been renewed through December 31, 1997?

7. Assuming there was no renewal in 1971, did Douglass comply with contractual requirements for the exercise of the option to renew the Ground Lease for the period beginning January 1, 1993?

8. Did the Assignable Ground Lease terminate under its own terms on January 1, 1993 for failure of Douglass to give contractually required notice of intent to renew?

9. Is the Building Lease a sublease of the Assignable Ground Lease?

10. Are Connell et al. "successors in interest"

to Douglass on the Building Lease?

11. If mailed but not delivered, did letter of September 4, 1991, Exhibit 27, satisfy the contractual and statutory requirements for notice of intent to renew?

12. Is the Postal Service entitled to occupancy under the terms and conditions of its Lease regardless of whether Douglass renewed his Lease?

13. Is Douglass barred by laches or equitable estoppel from asserting that the September 23, 1971 letters, Exhibit 7, renewed the second five-year option for the period January 1, 1993 to December 31, 1997?

EXHIBITS

The following exhibits may be received in evidence, if otherwise admissible, without further authentication, it being admitted that each is what it purports to be:

A Parties Combined List is attached hereto. All parties have agreed that these exhibits are admissible without further authentication, subject to objections at trial as to relevancy. In

addition, the Depositions of Harlan Douglass, Maxine Douglass, and Julia Connell are agreed to as exhibits subject to appropriate objections at trial.

Other than for impeachment purposes, the only exhibits admitted at trial will be exhibits identified herein or on a supplemental list filed at least fifteen (15) days before trial, or at such earlier date as may have been set by the Court, which supplemental list shall bear counsel's certificate that opposing counsel has had an opportunity to examine the exhibits.

Objections to exhibits, except as to relevancy, must be heard prior to trial.

WITNESSES

Witnesses may be called at trial as revealed previously by witness lists filed by the parties.

Other than for rebuttal purposes [see LR 1.3(a)], no witnesses may be called unless as listed in the above referenced pleadings.

RELIEF SOUGHT IN TRIAL

The parties estimate two (2) days trial time. The parties stipulate and agree that this matter shall be heard by a judge.

Unless otherwise specified in a scheduling order, proposed Findings of Fact and Conclusions of Law and trial memoranda shall be filed and served at least five (5) days, exclusive of Saturdays, Sundays and holidays, prior to commencement of trial.

ACTION BY THE COURT

IT IS HEREBY ORDERED that the foregoing constitutes the Pre-Trial Order in the case and that upon the filing hereof all pleadings pass out of the case and are superseded by this Order. This Order may be amended by consent of the parties and approval by the Court or by the Court to prevent manifest injustice.

DATED THIS 9th day of June, 1994.

/S/

Hon. FRED L. VAN SICKLE
United States District Judge

Approved as to Form and Content:
Notice of Presentment Waived

/S/

RICHARD C. DULLANTY, Jr.
Attorney for Defendants/Third Party Plaintiffs

/S/

JOSEPH P. DELAY
Attorney for Plaintiffs

/S/

JOSEPH H. HARRINGTON
Attorney for Third Party Defendant

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HARLAN D. DOUGLASS; MAXINE H. DOUGLASS,	CA Nos.	95-35110/ 95-35122
Plaintiffs-Appellees, Cross-Appellants,	DC No.	CV-93-00335-FVS
v.		
CHARLES F. CONNELL; JULIA K. CONNELL, husband and wife, individually and as successor-in-interest; VIRGINIA DULLANTY, PATRICIA SCHULLER, each as their separate property,		MEMORANDUM*
Defendants-Third Party Plaintiffs/Appellants, Cross-Appellees,		
v.		
UNITED STATES POSTAL SERVICE,		
Third Party Defendant/ Appellee/Cross Appellee.		

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

Appeal from the United States District Court
Eastern District of Washington
Fred L. Van Sickle, District Judge, Presiding

Argued and Submitted January 11, 1996
Seattle, Washington

BEFORE: BROWNING and CANBY, Circuit Judges, and REA,** District Judge

Julia K. Connell, on her own behalf and as successor in interest to her deceased husband, Charles F. Connell, challenges the district court's decision to reinstate a ground lease. Connell further argues that the Postal Service's building lease was a sub-lease of the ground lease and therefore expired when the ground lease did. Finally, Connell argues that the trial court improperly denied her request for attorneys' fees. On cross-appeal, Harlan and Maxine Douglass contend that the district court erred in holding that they failed to renew the ground lease. In addition, they argue that the district court erred in raising the ground rent payable to Connell. We affirm the renewal of the lease, but reverse the

** The Honorable William J. Rea, United States District Judge for the District of Central California, sitting by designation.

increase in rent.

BACKGROUND

The Connells, the owners of the land, entered into an Assignable Ground Lease with the U.S. Postal Service for a term of fifteen years, with the option to renew eight times in five-year intervals. The Assignable Ground Lease had the following provision:

> The option of renewing this lease shall be exercised by causing to be delivered to the Owner, by certified or registered mail, written notice of renewal and said notice shall be mailed to the Owner at least sixty (60) days prior to commencement of such renewal period.

The Assignable Ground Lease indicated the parties' intention that the Postal Service would assign the lease to a tenant, who would construct a Post Office building.

The Postal Service, in turn, assigned the Ground Lease to the Douglasses. Later that year, the Douglasses, to finance the construction of the Post Office building, contacted an institution which requested that they exercise the first two five-year renewal options. By certified mail, the Douglasses sent a letter andattached a document purporting to exercise the first two renewal options

("the 1971 renewal letter"). The parties contest whether the letter was signed, but agree that the attached document never was signed. The Douglasses did not respond to the Connells' attorney's request to sign the documents, and ultimately the Douglasses obtained financing from an institution that did not require that the first two options be exercised.

The Douglasses constructed a Post Office building and leased it to the Postal Service pursuant to a "building lease."

The Douglasses properly exercised the first five-year option on the Assignable Ground Lease. They state that they could not locate the 1971 renewal letter, so they sent a letter in 1991 to exercise the second five-year renewal option ("the 1991 renewal letter"). They sent the letter to the wrong address, however, and never received a delivery receipt.

Notice of the exercise of the second five-year option was due by November 1, 1992, and the first five-year renewal period ended on December 31, 1992. In April 1993, an employee of the Douglasses sent a memorandum to the Connells noting that the rent on the Assignable Ground Lease had increased beginning January

1, 1993. The following month, the Connells' attorney notified the Douglasses that the Assignable Ground Lease was terminated for failure to renew. The Douglasses FAXed a copy of the 1991 renewal letter, but the Connell's attorney refused to accept this delivery as an exercise of the second renewal option. The Douglasses then brought this action.

ANALYSIS

I. The district court properly held that the Douglasses did not give timely notice of renewal.

The district court properly concluded that neither the 1971 renewal letter nor the 1991 renewal letter gave timely notice of renewal. With respect to the 1971 renewal letter, the fact that the Douglasses sent a letter and attachment without a signature, requesting that the Connells sign the attachment first and return it for the Douglasses' signature, suggests that the Douglasses did not "indicate a definite, unequivocal, and unqualified determination" to exercise the two renewal options. Jones v. Dexter, 292 P.2d 369, 371 (Wash. 1956). Moreover, the district court properly found that the 1991 renewal letter did not serve to give timely

notice of renewal because the Douglasses sent the 1991 renewal letter to the wrong address and never received a delivery receipt. Because the Douglasses failed to give timely notice to renew, the district court properly held that the Douglasses failed to exercise the second five-year renewal option in accordance with the terms of the Ground Lease. See Wharf Restaurant, Inc. v. Port of Seattle, 605 P.2d 334, 340 (Wash. App. 1979) (citing Jones, 292 P.2d at 371) (right of renewal is generally lost if the lessee fails to give notice by a specific time in accordance with the provisions of the lease).

II. The district court properly used its equitable powers to reinstate the ground lease.

We review this issue for an abuse of discretion. Heckman Motors, Inc. v. Gunn, 867 P.2d 683, 685 (Wash. App. 1994) ("Whether equity requires [an exception to the general rule that an option must be exercised timely or it is lost] is in large part a matter addressed to the discretion of the trial court . . . .").

Although the right of renewal generally is lost if the lessee fails to give notice by a specific time in accordance with the pro-

visions of the lease, Wharf provides an exception to this general rule. Wharf, 695 P.2d at 340-41. The district court did not abuse its discretion by concluding that five "special circumstances" enumerated in Wharf, taken together, justify granting specific performance of the expired lease. It is true that the delay in notice in the present case was very lengthy (because the Douglasses thought that the renewal they mailed was effective), but all of the other factors of Wharf heavily favor the Douglasses: (1) the failure to give notice was purely inadvertent; (2) an inequitable forfeiture of the Douglasses investment would result if equity did not intervene; (3) the Connells did not change their position or otherwise suffer prejudice as a result of the failure to give notice; and (4) the lease was for a long term. See id. at 341 (discussing the five factors). Taken together, the Wharf factors support the district court's decision to effectuate the renewal.

III. The district court erred by raising the ground rent payable to the Connells.

The district court erred by raising the ground rent absent fraud, accident, or mistake. See Hedges v. Dixon County, 150

U.S. 182, 189 (1893) ("It is . . . well settled . . . that a court of equity, in the absence of fraud, accident, or mistake, cannot change the terms of a contract."); see also Miller v. Pacific First Federal Savings & Loan Ass'n., 545 P.2d 546, 549 (Wash. 1976). The Wharf court did not alter the rent when it reinstated the lease, Wharf, 605 P.2d at 339-42, and we have found no precedent in the State of Washington for doing so. Moreover, examples from other jurisdictions make clear that a court that reinstates a lease generally does not alter the rent. See, e.g., Duncan v. G.E.W., Inc., 526 A.2d 1358, 1365 (d.C. 1987) (reinstating lease without altering rent); Nanuet Nat'l. Bank v. Saramo Holding Co., 545 N.Y.S.2d 734, 735-36 (N.Y. App. 1989) (same).

IV. The district court properly held that the building lease is unaffected by this action.

The district court's order provided that "the Assignable Ground Lease shall continue as if the Douglasses gave proper notice to renew under the second option." The effect of that order, which today we affirm, is to deny any interruption in the Ground Lease term. As a consequence, the building lease remains

intact and unaffected by the Douglasses' late notice.

V. Connell is not entitled to attorneys' fees.

Connell is not entitled to attorneys' fees because she is not a prevailing party. Cf. Rettkowski v. Department of Ecology, 910 P.2d 462, 465-66 (Wash. 1996) (stating the circumstances under which the "prevailing party" may recover attorneys' fees).

CONCLUSION

We affirm the district court's determination that the Douglasses failed to renew the ground lease. We also affirm the district court's reinstatement of the lease, determination that the building lease remains intact, and refusal to award attorneys' fees. We reverse the district court's adjustment of the rent. The district court is therefore

AFFIRMED IN PART AND REVERSED IN PART.

The parties will bear their own costs.

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HARLAN D. DOUGLASS; MAXINE H. DOUGLASS,	CA Nos.	95-35110/ 95-35122
Plaintiffs-Appellees, Cross-Appellants,	DC No.	CV-93-00335-FVS
v.		
CHARLES F. CONNELL; JULIA K. CONNELL, husband and wife, individually and as successor-in-interest; VIRGINIA DULLANTY, PATRICIA SCHULLER, each as their separate property,	ORDER	
Defendants-Third Party Plaintiffs/Appellants, Cross-Appellees,		
v.		
UNITED STATES POSTAL SERVICE,		
Third Party Defendant/ Appellee/Cross Appellee.		

BEFORE: BROWNING and CANBY, Circuit Judges, and REA,** District Judge

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

** The Honorable William J. Rea, United States District Judge for the District of Central California, sitting by designation.